STATE OF NEW YORK
SUPREME COURT COUNTY OF NEW YORK

CAYUGA NATION and CLINT HALFTOWN,

Plaintiffs,

v.

Index No. 157902/2019

SHOWTIME NETWORKS INC., BRIAN KOPPELMAN, ANDREW ROSS SORKIN, and DAVID LEVIEN,

Defendants.

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

Respectfully submitted,

BARCLAY DAMON LLP
Attorneys for Plaintiffs Cayuga Nation and Clint Halftown

Barclay Damon Tower
125 East Jefferson Street
Syracuse, New York 13202
Tel.: (315) 425-2700

Lee Alcott, Esq., *Of Counsel*
David G. Burch, Jr., Esq., *Of Counsel*
Michael E. Nicholson, Esq., *Of Counsel*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

New York Cases

Page

Federal Cases

Page

Other Cases

Other Authorities

Plaintiffs Cayuga Nation ("Cayuga Nation" or "Nation") and Clint Halftown ("Mr. Halftown") (together "Plaintiffs") by and through their attorneys, Barclay Damon LLP, respectfully submit this Memorandum of Law in Opposition to the Motion to Dismiss the Complaint (the "Motion") filed by Defendants Showtime Networks, Inc., Brian Koppelman, Andrew Ross Sorkin, and David Levien (collectively, "Defendants") in this action.

PRELIMINARY STATEMENT

Billions is a Showtime drama series set in the world of New York City high finance centering on the untold maneuvering of the fictional United States Attorney turned State Attorney General, Charles "Chuck" Rhoades, and billionaire hedge fund manager, Bobby "Axe" Axelrod, in their endless and generally dishonest pursuit of power, influence, and prestige. But Plaintiffs, the Cayuga Nation and Mr. Halftown, are *not* works of fiction—they are a proud, sovereign Indian nation and a real person. And yet, resurrecting the harsh and offensive stereotypes of Native Americans in the past, both the Nation and Mr. Halftown were thrust into *Billions* and portrayed as corruptible, perfidious, and even criminal people—people tied into illicit land deals and profit sharing agreements involving a casino whose very existence violates the law and imperils the Cayuga Nation's important and unique relationship with the federal government.

Defendants contend that none of the challenged statements are reasonably susceptible to a defamatory connotation and that no one would think Cayuga Nation Council Member Jane Halftown was meant to depict Clint Halftown. Without offering a single piece of evidentiary proof from anyone involved in the production of the Episode at issue, they *know* the Court can only see it their way. And they are *certain* that Plaintiffs' interpretation is so unfounded that the Court should block the challenged statements from the scrutiny of a jury. Informed solely by

their own interpretation of the content of the Episode, Defendants' position is at odds with the applicable precedents which contain no rule of law that would prevent Plaintiffs from proceeding with this action.

Aside from demonstrating that decades of attempts to restrain the disparagement of Native Americans have failed, Defendants' efforts to dismiss this action evidence a belief that the only real limit on their conduct is their own sense of self-restraint coupled with what race-based aspersions the public at large is willing to tolerate. But that is not the law. For the reasons set forth herein, Defendants' Motion should be denied.

BACKGROUND

As set forth more fully in the Complaint, the Cayuga Nation is one of the six Indian nations known as the Haudenosaunee,[1] an affiliated group of Indian nations that once owned and occupied vast tracts of land in what is today known as New York State, each with its own governing body, economy, history, and culture. Mr. Halftown is a citizen of the Nation and is the Nation's federal representative, as well as a member of the Nation's governing body: the Cayuga Nation Council.

Along with other commercial enterprises, revenues from which are used to fund the Nation's tribal programs and promote its self-sufficiency, the Nation has operated two Class II gaming facilities on lands within its reservation—both of which are tribally and federally regulated. But the Nation does not, and cannot, operate "casinos" as the term is federally defined or commonly understood. And the Nation has not entered, and cannot enter, into "land deals" or gaming revenue sharing agreements with outsiders.

In Season 4, Episode 8 of *Billions*, (the "Episode") New State Attorney General Chuck Rhoades ("Rhoades") enlists the assistance of his wealthy New York businessman father,

[1] More commonly, the English word of "Iroquois" is used in place of the Haudenosaunee.

Charles Rhoades, Sr. ("Rhoades, Sr.") to provoke his current adversary, United States Attorney General Jeffrey "Jock" Jeffcoat, by pushing through a pilot blockchain mobile voting program in New York State. This requires the approval of New York Board of Elections Commissioner Halloran ("Commissioner Halloran"), who has thus far rebuked Rhoades. In order to turn Commissioner Halloran, Rhoades, Sr. volunteers the services of the Cayuga Nation—or as he calls them "my Indians" or "my casino Indians"—because he partnered with them on the land deal "around the casino," and arranges a meeting. And so begins Mr. Halftown's and the Cayuga Nation's on-screen entry into the criminal world of *Billions* at the hands of the Defendants.

Rhoades and Rhoades, Sr. proceed to meet with the Nation council member Jane Halftown ("Council Member Halftown") who, prominently seated at the head of the table and flanked by other Nation affiliates, refers to a "land deal" with Rhoades, Sr. "surrounding the casino," on which Rhoades, Sr. "chiseled" the Nation—a Nation-run casino, which, by its very existence, is an illegal enterprise, as is any "land deal" relating to it. Council Member Halftown then reveals a young Cayuga Nation woman, who has been lying in wait behind a closed door and is holding an infant child. Objectifying the young woman as "fruits of our tribe" and remarking that this particular "fruit" has been "tasted" by Rhoades, Sr. (a man old enough to be her grandfather), Council Member Halftown makes clear that Rhoades, Sr. is the child's father and uses this tactical gambit as collateral. Measuring the situation, Rhoades tells Council Member Halftown "my father will sweeten your piece" of the illicit casino land deal.

In the scene that follows, Rhoades and Council Member Halftown—stereotypical headdress in hand—commit no fewer than three state and federal crimes when they threaten, strong arm, and ultimately bribe Commissioner Halloran into approving the pilot blockchain mobile voting program.

Plaintiffs, unwilling to stand for Defendants sullying their good names and damaging their reputations, commenced this action. Defendants, by their Motion, now seek dismissal pursuant to CPLR 3211(a)(1) and (a)(7).

STANDARD OF REVIEW

It is well settled that, on any motion to dismiss pursuant to CPLR 3211, the court's task, generally, is to determine whether the plaintiffs' pleadings state a cause of action hearable by the court. *See 511 W. 232nd Owners Corp. v. Jennifer Realty Co*., 98 N.Y.2d 144, 151–152 (2002). On a motion to dismiss based upon documentary evidence, pursuant to CPLR 3211(a)(1), dismissal is "warranted if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Id.* at 152 (citations omitted). On a motion to dismiss for failure to state a claim, pursuant to CPLR 3211(a)(7), "[t]he motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" *Id.* (citations omitted). The Court must liberally construe the complaint and "accept as true the facts alleged in the complaint and any submission in opposition to the dismissal motion." *Id*. (citing *Sokoloff v. Harriman Estates Dev. Corp*., 96 N.Y.2d 409, 414 (2001) (collecting cases)). And the plaintiff is accorded "the benefit of every possible favorable inference." *Id.* (citation omitted).

ARGUMENT

POINT I

THE CAYUGA NATION SHOULD BE PERMITTED TO PROCEED AS A PARTY

The Cayuga Nation is a sovereign Indian nation that is recognized by both the United States and the State of New York and is governed by the five-member Cayuga Nation Council which, based on the Nation's sovereign status, enjoys a direct government-to-government

relationship with the federal government. Because of this sovereignty and self-governance, Defendants contend the Nation is prohibited from asserting a defamation claim. In support of this contention, they liken the Nation to other types of "government entities," both within and without the territory of the United States, who have been precluded from asserting defamation claims. *See* Defendants' Memorandum of Law, p. 10 (collecting cases). While none of those cases deal with an Indian nation, Defendants would have this Court apply them by way of analogy: namely, an Indian nation is like the State of Louisiana, the Southampton Fire District, or a Zimbabwe-owned airline and, so, it too should be barred. But "[t]he condition of Indians in relation to the United States is perhaps unlike that of any two people in existence . . . marked by peculiar and cardinal distinctions that exist nowhere else," *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831), and that singular understanding has prevailed in the United States throughout our entire history. As such, none of these cases carry over by way of analogy or as a matter of law. Nor do they as a matter of policy.

Tempered by First Amendment concerns, the government cannot sue citizens for defamation because such lawsuits raise "the possibility that a good-faith critic of the government will be penalized for his criticism[.]" *New York Times v. Sullivan*, 376 U.S. 254, 292 (1964); *see Karaduman v. Newsday*, 51 N.Y.2d 531, 545 (1980) ("[T]he threat of being put to the defense of a lawsuit may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself." (alterations omitted) (citations omitted)). Nobody before this Court disputes that "every citizen has the right to criticise an inefficient or corrupt government without fear of civil as well as criminal prosecution." *Chicago v. Tribune Co.*, 307 Ill. 595, 607–608 (1923). But Defendants' statements here did not come about as the result of a political movement, protest, or any other moving force of social upheaval—and certainly not as the result of media critical of an

inefficient or corrupt government. Quite the opposite, they are entirely gratuitous. Viewed in this light, the Nation's lawsuit to defend its good name can hardly be seen as an effort to stamp out free speech.

Declining to extend the "government entity" proscription to Indian nations does not require disavowing the precedents Defendants cite, nor would this Court be doing so.[2] Indian nations are simply not akin to the entities in the cited precedents, fact-or-policy wise: indeed,"[t]he very term 'nation,' so generally applied to them, means 'a people distinct from others.'" *Worcester v. Georgia*, 31 U.S. 515, 559 (1832). To find that they are would not only overlook our country's history, but actively repudiate it. Accordingly, the Nation should be permitted to proceed as a party in these proceedings.

POINT II

PLAINTIFFS HAVE PLAINLY STATED A CLAIM FOR DEFAMATION SUPPORTED BY THE FACTS AND THE LAW

A. The Challenged Statements are Defamatory

Defendants first contend that Mr. Halftown cannot sue because the challenged statements, they say, are not defamatory. They reach that conclusion not based on neutral principles of this State's laws, but on their own interpretation of what those statements mean. And, by their Motion, Defendants seek this Court's imprimatur on that interpretation in hopes of seizing the question away from a jury—to whom this State's law appropriately leaves it. While both Defendants' interpretation of the challenged statements and their unrestrained conception of the judicial role are predictably compatible, they are fundamentally inconsistent with the law.

[2] In the alternative, Defendants argue the Nation's claims are barred under the group libel doctrine, citing to *Diaz v. NBC Universal, Inc.*, 536 F. Supp. 2d 337, 343 (S.D.N.Y. 2008) (denying a 400-member group claim) and contending: "A group with 500 members is simply too large to assert a defamation claim *as a matter of law*." Defendants' Memorandum of Law, p. 10 n.6 (emphasis added). Yet, that is directly contrary to *Diaz*, which makes clear "[t]he New York Courts have not set a particular group number above which defamation of a group member is not possible." *Diaz*, 536 F. Supp. 2d at 343.

In New York, defamatory words are generally those "which tend to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society." *Kimmerle v. New York Evening Journal, Inc.*, 262 N.Y. 99, 102 (1933) (citation omitted). "Whether language has that tendency depends, among other factors, upon the temper of the times, the current of contemporary public opinion, with the result that words, harmless in one age, in one community, may be highly damaging to reputation at another time or in a different place." *Mencher v. Chesley*, 297 N.Y. 94, 100 (1947) (citations omitted). This rule of interpretation is no small formality. "If the contested statements are *reasonably susceptible of a defamatory connotation*, then it becomes the jury's function to say whether that was the sense in which the words were likely to be understood by the ordinary and average [person][.]" *James v. Gannett Co.*, 40 N.Y.2d 415, 419 (1976). Further, while Defendants' depiction and treatment of Native Americans may have been considered "harmless in one age," it certainly is not in this, "the current of contemporary public opinion." *See Mencher*, 297 N.Y. at 100. And it is precisely this higher standard of "contemporary public opinion" to which the Defendants must be held. *Id*.

In all, "[t]he court must decide whether there is a reasonable basis for drawing the defamatory conclusion" here. *Id.* What that means in the present failure-to-state-a-claim context is that unless this Court finds the defamatory statements are nonlibelous as a matter of law, the complaint states a cause of action and cannot be dismissed. *See Tracy v. Newsday, Inc.*, 5 N.Y.2d 134, 135 (1959). The Court may not strain to find defamatory meaning where none exists. *Sprecher v. Dow Jones & Co.*, 88 A.D.2d 550, 551 (1st Dep't 1982). But neither may the Court take the exact opposite tack: the "[w]ords charged to be defamatory are to be taken in their

natural meaning, and the [Court may] not strain to interpret them in their mildest and most inoffensive sense in order to hold them nonlibelous and nonslanderous." *Nowark v. Maguire*, 22 A.D.2d 901, 901 (2d Dep't 1964) (citation omitted). And yet, through their assiduous parsing of words, Defendants implore the Court to do just that.

They begin with the following exchange, set forth in the Complaint and recaptured by Defendants in their Memorandum of Law:

* * *

> Jane Halftown: Mr. Rhoades, you want me to lobby the elections board for you. Why would I do that for the people who *chiseled us on the land deal surrounding the casino.*
>
> Chuck: Chiseled? I thought partnership was more—
>
> Jane Halftown: Your father has tasted the fruits of our tribe in a way that makes us disinclined to trust either him or you. [on screen, Jane Halftown motions for a Cayuga woman to carry over a baby fathered by Charles, and Charles coos over the baby.]
>
> Chuck: My father will *sweeten your piece* on Kingsford to what you feel is fair.
>
> Charles: Fine. Whatever my overly generous son needs.

Defendants' Memorandum of Law, pp. 12–13 (emphasis added).

* * *

Rather than attempt to justify the "tasted the fruits of our tribe" degradation, Defendants ignore it entirely and narrow their focus to the language involving the "land deal," claiming that "[o]n its face, this statement refers to a deal for land '*surrounding*' a casino, not the land on which the casino was actually built"—a difference of no real substance. *Id.* at 13. And, they continue, this is "entirely consistent with a prior statement in the Episode, which explains that Rhoades, Sr. 'partnered with the [Cayuga Nation] on *the land around the casino* in Kingsford." *Id*. From this, Defendants neatly conclude, "no statement in [this] scene, or anywhere else in the Episode, can be reasonably understood to convey that the Cayuga Nation 'owns casino land' or

that it participated in an 'illegal casino land deal.'" *Id.* This type of exacting semantics—homing in on the narrowest possible construction of the words "surrounding" and "around"—defies Defendants' own admonition: "This Court is obligated to construe the statements at issue here 'not with the close precision expected from lawyers and judges but as they would be read and understood by the public to which they are addressed.'" *Id.* at 14 (quoting *November v. Time, Inc.*, 13 N.Y.2d 175, 178–179 (1963)). It is also belied by the dictionary definitions of those words. *See* Miriam-Webster Online Dictionary, 2019, https://www.merriam-webster.com/ (defining "surrounding" to mean, among other things, "to be closely related or connected to (something)" and "around" to mean "so as to have a center or basis in."). And it equally defies common vernacular: an "average person" would, no doubt, understand the "land surrounding" their house to be part of their property.

Defendants go on and argue that the Episode "clearly did not state that [Council Member Halftown] was involved in sharing gaming revenue with outsiders." Defendants' Memorandum of Law, p. 13. That statement is impossible to square with the plain language of the exchange. If it were true, then there would be no ongoing revenue stream coming from the "land deal," and thus no vehicle by which to "sweeten [Council Member Halftown's] piece." In fact, there would be no free-floating "piece" at all. And it is difficult to come up with a more apt turn of phrase to describe redistributing the proceeds of an illicit profit sharing agreement than: "sweeten your piece."[3] What logically follows is the Nation is involved in an illicit land deal and profit sharing arrangement brokered and overseen by its council member. At a minimum, it is a question for a jury and not the Court at this procedural posture. *James*, 40 N.Y.2d at 419.

[3] In fact, the very use of this type of coded language—the type a criminal might use to avoid a wiretap—infects the entire dialogue and only furthers the explicit story line that Halftown is engaging in criminal activity.

Defendants then assert "there is simply nothing wrong – or even defamatory – about running a casino or collaborating on a land deal." Defendants' Memorandum of Law, p. 14. But—as the Complaint makes perfectly clear—for the Nation, there is. Aside from undermining the Nation's relationship with the federal government, running a casino or collaborating on a casino land deal would threaten (if not destroy) the Nation's longstanding efforts to place its historical lands in trust. And it would be damaging to Mr. Halftown's reputation and standing both with Nation's citizens and the federal government. Defendants appear unmoved by that inevitability, dismissing the predicament as "lengthy pleadings about the technical definition of 'casino' . . . [that] merely underscore how convoluted Plaintiffs' interpretation" is (*id.*) and relegating their discussion of the impact of Nation's proscription from entering land deals or gaming revenue sharing agreements with outsiders to a footnote. *Id.*, p. 15 n.9. But Defendants' marked indifference to the depiction of the Nation and Council Member Halftown engaging in prohibited conduct does not make it any less problematic and defamatory.

When Defendants turn to the law, they rely heavily on precedents that state courts generally reject claims that "call for the court 'to strain to place a particular interpretation on published words.'" *Id.*, p. 16 (collecting cases). These cases do not hold, of course, that words are not to be afforded their natural meaning or are to be taken in their mildest or most inoffensive sense—precedent says the opposite. *Nowark*, 22 A.D.2d at 901. Instead, they stand for the general rule of construction that words are imbued with meaning by the overall framework in which they are presented. *See, e.g., Cassini v. Advance Publ'ns, Inc.,* 125 A.D.3d 467, 468 (1st Dep't 2015) (determining "[g]iven the overall context in which the statements were made, a reasonable reader would not conclude plaintiff was a prostitute or otherwise unchaste." (citations omitted)); *Bement v. N.Y.P. Holdings, Inc.*, 307 A.D.2d 86, 92 (1st Dep't 2003) (concluding

challenged statements about plaintiff must be read in the context in the published article which "conveyed the view that her alleged conduct amounted to a sacrifice for the good of her country"); *Alfajr Printing & Publ. Co. v. Zuckerman,* 230 A.D.2d 879, 880 (2d Dep't 1996) (holding "words must be construed in the context of the entire statement or publication as a whole"); *Greene v. Health & Hosps. Corp. of City of New York*, 213 N.Y.L.J. 36 (Sup. Ct. N.Y. Cnty. Mar. 31, 1995) (same).

Simply put, context always matters. Here, Rhoades and Rhoades, Sr. meet with Council Member Halftown at Cayuga Nation offices, where she is flanked by an unnamed man and woman on her left-hand side, and, behind her, a man is positioned near a closed door in the rear. More than two minutes into their conversation, and after Rhoades makes his "pitch" for the Nation's lobbying assistance, Council Member Halftown reveals, "[y]our father has tasted the fruits of our tribe in a way that makes us disinclined to trust either him or you," and nods to the man standing near the rear office door. He opens it and reveals a young Nation woman holding an infant: the product of Rhoades, Sr.'s adultery. Hardly the depiction of a person who is "ethical and completely incorruptible,"[4] Council Member Halftown weaponizes the young Nation member and her infant child as capital in a back-and-forth with a cast of characters who, she knows, are a case study in corruptness. And it is in this context—a world of double-dealing, chicanery, and corruption—that the challenged statements must be construed. *Zuckerman*, 230 A.D.2d at 880.

This context carries over to the second scene in question, where Council Member Halftown now accompanies, and teams up with, Rhoades—a man she knows firsthand to be crooked—to pressure Commissioner Halloran. Commissioner Halloran enters a room apparently

[4] Defendants' Memorandum of Law, p. 8 ("Jane is savvy, witty, she is ethical and completely incorruptible.").]

expecting to find only Rhoades, and is ambushed by Council Member Halftown, seated next to Rhoades, to persuade him to launch the mobile voting pilot program.

* * *

> Commissioner Halloran: So what is so important you gotta drag [seeing Council Member Halftown remove a headdress from a box set on the table] . . . oh [bleep].
>
> Council Member Halftown: Don't make my People put these on. Thirty of my compatriots in full regalia. Don't make me give interviews about how you are refusing us the vote. Don't make me stage a sit-in at your office.
>
> Commissioner Halloran: You're shoving a [bleeping] arrowhead up my [bleep]?
>
> Rhoades: Oh, how dare you, sir?
>
> Council Member Halftown: Besides, I'm not shoving it. You'd be sitting down on it, of your own accord.
>
> Commissioner Halloran: Oh.
>
> Council Member Halftown: But at your weight, that's where it would end up for sure.
>
> Commissioner Halloran: Ooh. So you're allowed to be insensitive, but I'm not?
>
> Rhoades and Council Member Halftown: Yes!
>
> Commissioner Halloran: Oh, [bleep]. Yeah, you've got your pilot program.
>
> [Rhoades then stands up from his seat next to Council Member Halftown, walks a few steps across the room, pulls an envelope out of his jacket pocket and hands it to Commissioner Halloran]
>
> Rhoades: It's not all stick. In this envelope you'll find tickets and hotel confirmations for you and the Mrs., Aruba, all expenses paid.

* * *

As set forth more fully in the Complaint, this exchange constitutes the commission of no less than three crimes under the New York Penal Law and the United States Code in which Council Member Halftown participates. Compl., ¶¶ 49–56. Indeed, there is no dispute that it depicts palpably unethical behavior—*Defendants say that it does*. Defendants' Memorandum of Law, p. 18 (conceding "the Scene depicts unethical behavior[.]"). Attempting to circumvent this

problem, Defendants add, in conclusory fashion: "it is Commissioner Halloran and Chuck that are acting unethically, not Jane." *Id.* This conclusion is extraordinary; and it is telling how quickly Defendants cast their repeated characterizations of Council Member Halftown aside in their haste to reach a desired result. When it suits Defendants' narrative, she is shrewd and savvy, and when it does not, she is unclever and naïve, completely unaware of the bribery taking place in front of her face. And, as Defendants would have it, she colludes with Rhoades to strong arm Commissioner Halloran at the meeting not for the *quid pro quo* that Rhoades will "sweeten [her] piece," but as a mere "representative of a group of disenfranchised voters[.]" Defendants' Memorandum of Law, p. 18. For all that, they claim Council Member Halftown "comes off as the only ethical person" in the scene. *Id.* In reality, the scene paints a very different picture.

If the Court is to draw a sharp line at this procedural juncture, as Defendants ask it to do, it should be that "there is a reasonable basis for drawing the defamatory conclusion" here. *James*, 40 N.Y.2d at 419. If anything, the picture is less clear cut, in which case what matters, *and all that matters*, is not how counsel for the parties—or even this Court—interpret the scenes, but what the ordinary and average person would make of them. *Colpitts v. Fine,* 42 A.D.2d 551, 551 (1st Dep't 1973) ("It is enough that a reasonable basis exists for such an interpretation. Once that is decided, it becomes the jury's function to say whether that was the sense in which the words were likely to be understood by the ordinary and average [person.]" (citation and internal quotation marks omitted)). The "ordinary and average person" here comes in the form of a jury. *Id.*

B. The Challenged Statements Depict Plaintiffs the Nation and Clint Halftown

Defendants contend Plaintiffs' libel claims fail because no reasonable viewer would understand the depiction of Council Member Halftown to be "of and concerning" Mr. Halftown.[5] While it is true that "[a] statement is not libelous unless it is 'of and concerning' the plaintiff," *Dalbec v. Gentleman's Companion, Inc.*, 828 F.2d 921, 925 (2d Cir. 1987), Defendants initially mischaracterize the "of and concerning" test. They claim "[t]he plaintiff must establish that reasonable viewers would believe the fictional character *is*, in fact, the plaintiff." Defendants' Memorandum of Law, p. 19 (citing *Springer v. Viking Press*, 90 A.D.2d 315, 319–320 (1st Dep't 1982)). But that is not *Springer's* instruction. Indeed, as Defendants go on to clarify, *Springer* holds:

> The teaching of these cases is that for a defamatory statement or statements about a character in a fictional work to be actionable the description of the fictional character must be so closely akin to the real person claiming to be defamed that a [person], knowing the real person, would have no difficulty *linking the two*.

Springer, 90 A.D. at 320 (emphasis added). In other words: "It is not necessary that the whole world should understand the libel; it is sufficient if those who knew the plaintiff can make out that he was the *person meant*." *Fetler v. Houghton Mifflin Co.*, 364 F.2d 650, 651 (2d Cir. 1966) (emphasis added) (citation omitted). Defendants string-cite an amalgam of cases in an effort to form a general prescription for this Court "that the mere confluence between names of the plaintiff and a character and other abstract characteristics (like occupation) is not sufficient to state a libel claim in a work of fiction." Defendants' Memorandum of Law, pp. 24–25 (collecting cases). That proposition is an act of Defendants' will, not of legal judgment. "Because the 'of and concerning' inquiry is so fact specific, *New York courts have failed to carve out consistent guidelines for determining how similar the plaintiff and the fictional character must be*." *Greene*

[5] Defendants do not dispute that the Episode was "of and concerning" the Cayuga Nation. Nor can they; it depicted the Cayuga Nation by name, and went further to even specifically identify the Nation's people as Haudenosaunee.

v. Paramount Pictures Corp., 138 F. Supp. 3d 226, 235 (E.D.N.Y. 2015) (emphasis added) (collecting cases).

At bottom, to withstand a motion to dismiss, a plaintiff must simply "advance colorable claims of having been identified and described by defamatory comment." *Church of Scientology Int'l v. Time Warner*, 806 F. Supp. 1157, 1159–1160 (S.D.N.Y. 1992), *aff'd sub nom. Church of Scientology Int'l v. Behar*, 238 F.3d 168 (2d Cir. 2001) (alterations and internal quotation marks omitted). A plaintiff bears the burden of pleading and proving that the libel "designates the plaintiff in such a way as to let those who know him understand that he was the person meant." *Three Amigos SJL Rest., Inc. v. CBS News Inc.*, 132 A.D.3d 82, 89 (1st Dep't 2015) (citations omitted). Although this generally presents a question of fact for the jury, the Court may dismiss an action "where the statements are incapable of supporting a jury's finding that the allegedly libelous statements refer to plaintiff." *Greene*, 138 F. Supp. 3d at 234; *see Cardone v. Empire Blue Cross and Blue Shield*, 884 F. Supp. 838, 847 (S.D.N.Y. 1995) ("Whether the complaint alleges facts sufficient to demonstrate a reasonable connection between the plaintiff and the alleged libel is a question for the court."). That is not the case here.

Council Member Halftown is a Native American Cayuga Nation council member and plainly, from the scenes depicted, its government's representative. Mr. Halftown is a Native American Cayuga Nation council member and is also the Nation's federal representative, *i.e.*, its government's representative. In sum, they share the same ethnicity, heritage, tribal membership, tribal position, and last name. They also share the unique position of being the Nation's government's representative. Taken together, there is only one "Halftown" who is a "council member" of the "Cayuga Nation." As such, Jane Halftown and Clint Halftown are singularly interchangeable but for their sex. Courts have denied motions to dismiss with far fewer

similarities. *See Geisler v. Petrocelli*, 616 F.2d 636, 641 (2d Cir. 1980) (holding same name and physical characteristics were sufficient to withstand a motion to dismiss); *see also Fetler*, 364 F.2d at 651–652 (holding similar family composition and history were sufficient to present an issue of fact to the jury).

Here, there can be little doubt that anyone who saw the depiction of Council Member Halftown and knows Mr. Halftown "would have no difficulty linking the two" and would "make out that he is the person meant." *Springer*, 90 A.D. at 320; *Fetler*, 364 F.2d at 651. That Defendants disagree with that consequence does not make it any less legitimate or require dismissal of the Complaint.

Finally, it is revealing that Defendants' Motion fails to explain how, if they did not intend to depict Mr. Halftown, they randomly ascertained the name of his Nation, his own unique name, and his particular and unique position within the Nation. Even if it was by pure happenstance—which defies even the most basic common sense—for "of and concerning" purposes, "[t]he question is not so much who was aimed at but who was hit." *Fetler*, 364 F.2d at 651. The reality is they aimed at Mr. Halftown, and they hit him squarely.

Perhaps recognizing what little support they can derive from the facts, they ultimately try to palm them all off as unmitigated fiction. They say: "None of these events happened." Defendants' Memorandum of Law, p. 22. "None of these characters is remotely real." *Id.* But, of course, that is exactly the point of this litigation: the Nation and Mr. Halftown are very much real. And because of that, the ordinary viewer could reasonably consider the events depicted that involve them to be real as well. *See Batra v. Wolf*, No. 116059/04, 2008 N.Y. Misc. LEXIS 1933, *10 (Sup. Ct. N.Y. Cnty. Mar. 14, 2008) (denying motion to dismiss libel-in-fiction claim arising out of television series *Law & Order*).

In all events, Plaintiffs have plainly stated a claim for defamation under the facts and the applicable law: namely, that the challenged statements are "of and concerning" the Nation and Mr. Halftown and are reasonably susceptible to a defamatory connotation. Defendants' Motion to Dismiss Plaintiffs' defamation causes of action should therefore be denied.

POINT III

PLAINTIFFS STATE A CLAIM FOR MISAPPROPRIATION OF LIKENESS

Section 51 of the New York Civil Rights Law protects a person from the unauthorized use of his "name, portrait, picture or voice" within this State for advertising or trade purposes. N.Y. Civ. Rights Law § 51. Here, Defendants used the Nation's and Mr. Halftown's names. Defendants concede as much, but contend "it is not enough for [Council Member] Clint Halftown to claim that he and the fictional [Council Member] Jane Halftown *happen* to share a last name." Defendants' Memorandum of Law, p. 27 (emphasis added). It is striking how much the two also *happen* to share in common: the same ethnicity, heritage, tribal membership, and tribal position. These distinct and precise identifiers, taken together, are more than enough to single out Mr. Halftown and to state a claim for name appropriation for purposes of Section 51. *Orsini v. Eastern Wine Corp.*, 190 Misc. 235, 236 (Sup. Ct. N.Y. Cnty. 1947) (holding "the allegations of the complaint with respect to the use of the coat of arms in conjunction with the surname, presents a method of identification of plaintiff which may be as effective as a full name."); *see Gardella v. Log Cabin Products Co.*, 89 F.2d 891, 894 (2d Cir. 1937) (the name "Aunt Jemima" would fall within Section 51 absent defendant holding trademark rights).

At the same time, the ultimate question of whether the average viewer would, taking into account all of the surrounding facts, find the depiction of Council Member [Jane] Halftown to have misappropriated the name of Council Member [Clint] Halftown is not a pleading question,

but a proof question not reachable on this CPLR 3211 procedural posture. *Orsini*, 190 Misc. at 236 ("The argument made by defendant that the average purchaser of defendant's wine would not associate the family crest and crown with plaintiff personally, is an argument addressed to proof and not allegation."). Dismissal at this, the earliest, stage of litigation, would leave the Plaintiffs, as well as this Court, without an explanation as to how and why Defendants chose Mr. Halftown's unique surname for inclusion in the Episode.

While "advertising purposes" under Section 51 "is defined as solicitation for patronage, intended to promote the sale of some collateral commodity or service . . . . Use for the 'purpose of trade' [is] not susceptible to ready definition[.]" *Davis v. High Soc. Magazine, Inc.*, 90 A.D.2d 374, 379 (2d Dep't 1982) (citations omitted). However, courts have ascribed its general boundaries: "a finding for that a publication was for purposes of trade may be predicated on either the lack of a reasonable connection between the use and a matter of public interest, or on a finding that the use contained substantial fictionalization or falsification." *Id.* at 381 (citations omitted). "This interpretation of [Sections 50 and 51] gives redress to the victims of some of the more devastating, but often subtle, techniques of commercial exploitation of a person's identity." *Id.*

Here, Defendants' use of Mr. Halftown's name both had no connection to a matter of public interest and was substantially false. More than that, it sullied his name with the taint of criminality. *See id.* (holding "when a plaintiff's photograph is used as an illustration in an article on illicit drug dealing, with which, in fact, the plaintiff has no connection, the use may be considered as one for trade" (citations omitted)). Accordingly, Defendants' use of Mr. Halftown's name constitutes "commercial exploitation of [his] identity" for "purposes of trade" for which Section 51 provides him redress. *Id.*

Still, as Defendants would have it, in this modern technological era, where *Billions* is available unbundled and a la carte from providers like Amazon Prime and iTunes at the click of a button, they have a perpetual license to misappropriate with every click, while at the same time—by packaging the misappropriation in the form of a television show—the power to deprive Mr. Halftown of statutory protection. But they should not be so certain. Longstanding precedent leaves the door open for claims arising from depiction in works of fiction. *See Stillman v. Paramount Pictures Corp.*, 2 A.D.2d 18 (1st Dep't 1956). Defendants' Motion to Dismiss Plaintiffs' misappropriation of likeness claim should be denied.

CONCLUSION

Native Americans have endured 500 years of oppression; Defendants' conduct warrants more than Mr. Halftown and the Cayuga Nation being turned back at the courthouse door. Defendants' Motion should be denied in its entirety.

Dated: November 27, 2019

BARCLAY DAMON LLP

By: s/ *Lee Alcott*
Lee Alcott
David G. Burch, Jr.
Michael E. Nicholson

Attorneys for Plaintiffs
Cayuga Nation and Clint Halftown

Barclay Damon Tower
125 East Jefferson Street
Syracuse, New York 13202
Tel.: (315) 425-2700